United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2100

To be argued by
JULIA P. HEIT

ORIGINAL

B P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

RICHARD PERRY and FORREST GERRY,

Appellants.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF IN BEHALF OF APPELLANT RICHARD PERRY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

-against- : 74-2100

RICHARD PERRY, :

Defendant-Appellant. :

STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered July 19, 1974 in the United States District Court for the Eastern District (Judd, J.) convicting Appellant Perry after trial of wilfully carrying into effect and attempting to carry into effect a scheme in commerce to influence by bribery a sporting contest and conspiring to do the same in violation of Title 18 U.S.C. Sec. 224,2. Appellant Perry was sentenced to serve a term of two and one-half years pursuant to Title 18 Sec. 4208 (a)(1) with eligibility for parole after six months.

Execution of sentence has been stayed pending appeal.

QUESTIONS PRESENTED

1. Whether the evidence was insufficient to prove that Appellant Perry committed any crimes.

2. Whether the court's failure to hold a hearing to determine whether Government witness, Bruce Cussell, was a competent witness, requires the reversal

of Appellant Perry's conviction.

3. Whether the deliberate elicitation by the Government of evidence that Appellant Perry was associated with the mob destroyed any possibility of his receiving a fair trial.

4. Whether the lawless conduct of the Government in this case is so offensive to the administration of justice that an acquittal should have been ordered as a matter of Due Process.

5. Whether the court should have sua sponte declared a mistrial once its integrity had been placed into issue at trial.

6. Whether the conditioning of the playing of the tape recordings upon the availability of transcripts of those tapes unduly restricted Appellant Perry's Constitutional right to cross examine the witnesses against him.

7. Whether the charge to the jury was replete with prejudicial statements and read in its entirety was partial to the Government's case.

8. Whether the testimony pertaining to the prior similar acts was so prejudicial that the court should have refused to allow it into evidence.

9. Whether the other errors committed during the course of the trial require the reversal of Appellant Perry's conviction.

STATEMENT OF FACTS

INTRODUCTION

Appellant PERRY and 28 co-defendants were charged in a two count indictment with wilfully carrying into effect and attempting to carry into effect a scheme in commerce to influence by bribery sporting contests, to wit, the outcome of harness races at Yonkers and Roosevelt Raceways in violation of Title 18 U.S.C. Sec. 224, 2. The Defendants were also charged with conspriring to do the same. Only Appellant Perry and the Defendant Gerry were convicted of the aforementioned charges.

SCHEME

The Government in order to establish its theory that the betting patterns reflected in the OTB printouts gave rise to the inference that the races were fixed presented three witnesses.

First, Michael Shagan, Vice President of OTB, described the OTB betting proceedures and the initiation of the investigation into what he thought to be unusual betting patterns of the Superfecta races.

Shagan explained that a Superfecta race was an exotic race wherein the bettor could purchase three different types of tickets: in a three dollar bet, the bettor had to pick the first four horses in the exact order that they finished

(523)*; in an eighteen dollar bet (key box), the bettor had to choose the horse that would finish first but the horses which finished in the next three slots could be in any combination; and in a seventy two dollar bet (box bet), the bettor had to pick the first four horses in any combination. (524) This witness further explained that if someone wanted to bet every single possible combination on an eight horse Superfecta race, he would have to punch 1680 three dollar tickets and the odds against winning were 1680 to 1. If only six horses had to be considered in a race, the odds were reduced to 360 to 1. (625)

According to Shagan, a review of the 1099 tax forms** showed that certain individuals were cashing more than one Superfecta ticket at a time which often had a payoff of $2000 or $3000 per ticket. (572) Shagan thought this highly unusual compared to the normal situation at OTB where it was rare for one teller to cash more than one or two exotic winning tickets. (572) However, he did acknowledge that OTB had no limit on the number of Superfecta tickets that an individual could purchase and that they in fact invited business. (859, 871) From the 1099 forms, he went on to identify groups of people who had cashed multiple winning Superfecta tickets amounting to one and a quarter million dollars. (572) He was able to determine that a relation-

* Numerical references are to the pages of the trial transcript.
** 1099 forms are internal revenue forms that must be filled out before payment of a winning ticket would be permitted.

ship existed between the purchasers and the cashers of the tickets as the tickets that had been cashed had been purchased a few minutes apart at the same window. (573)

Next, Shagan investigated the betting patterns reflected in a series of transactions. (576) He established first, that the money bet in the various transactions greatly exceeded the norm of the OTB bettor; second, that a great many $18 and $72 tickets were brought in addition to an unusual amount of $3 tickets; and third, many of these tickets reflected the same general pattern of leaving out certain horses and keying in one or two horses. (581) Shagan admitted telling the Grand Jury "Whether it is great handicapping or fixing, it is not something we can tell from our records". (920-921)

The Government then sought to introduce into evidence 40 charts which they claimed was representative of the OTB records. Each chart represented a selected day of Superfecta activity. The charts showed the identity of the cashers of Superfecta tickets when known, the total amount cashed, the branch and window where the tickets were purchased, the OTB clerk on duty, the total amount of the purchase, the betting parameter (which horses were left out and which were keyed in) and the identity of the purchaser of the tickets when known. The Government maintained that the charts represented all the large Superfecta punches within the city OTB system. (697)

AGENT NICHOLAS GINATURCO, who prepared the charts, testified that his review of OTB documents consisted first of examining the 1099 forms and then ordering the computer print outs for those days which showed multiple winners. (677) He'd then examine the branch settlement sheets which gave a rundown of everything that happened that day at that branch. (678) The Agents looked at every large figure over $3000. (682) According to Gianturco, at approximately 30 of the 80 branches, there were large punches and at about 7 or 8 branches, certain individuals were betting regularly $6000, $8000, or $12,000 on one punch. (683) They therefore ordered the days of the print-outs on a selective basis. (684) The charts showed that there were 22 winning days and 18 losing days.(1677)

On cross examination, Agent Ginaturco admitted that by looking at the charts he could not tell how many of the longest horses in the races were left out during this 40 day period nor did he know the betting pattern for the rest of the city since he did not have the computer printouts for the small individual bets.(697) The charts did not indicate the betting odds for a particular horse run in the Superfecta; it did not reflect the winning tickets at either Roosevelt or Yonkers Raceway; it did not include the weather conditions on the chosen days, the racing history of the horses, the positions the horses drew for the race, or the condition of the tracks. (738-39, 748-49,755)

In fact, the Agent admitted that he had no written guidelines when he prepared the charts. (756) He likewise admitted that the charts showed the Government's theory of the case and not the entire factual situation. (748)
He further acknowledged that while the betting parameter was essential in this case, he could not give the overall betting parameter picture of the OTB and the betting parameter played an essential role as to who was a defendant in the present case. (805A, 807)

Because the Government relies on the betting parameter set forth in the charts to raise the inference that the races were fixed, it is necessary to analyze some of the races for which the defendant drivers were charged with accepting bribes.* It must be pointed out, however, that it is impossible to determine how the Government decided that a particular racing result warrarted charging a particular driver with bribery.

In the February 5th race, only Defendant Abbatiello was charged and his horse was ommitted in the betting parameter. However, in a last minute driver change, Defendant McNutt drove his horse and won the race. Fontaine, who was not a defendant or co-conspirator, came in second but was left out of the betting parameter. The Defendant Gilmour, whose horse the bettors keyed for 4th position but who finished fifth, was

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* The record shows that the Government never offered any proof, direct or otherwise, relating to each race that would show the defendant driver or drivers agreed to fix that particular race.

not charged in this race. (1177-1180)

In the February 6th race, there were no winners and only Defendant Insko was charged. Insko, whose horse was left out of the betting parameter, finished in the top four causing the loss. (1637)

In the February 8th race, only the Defendant Gilmour was charged. His horse, which was left out of the betting parameter and faced odds of 13 to 1, finished 7th. The Defendant Myers, whose horse was keyed by the bettors and who won the race, was not charged. (1190-91)

In the February 10th race, there were no winners and only the Defendant Ross was charged. His horse was omitted in the betting parameter and was the third worst horse in the race. Ross finished sixth, a position consistent with the odds. (1195-96)

In the February 14th race, the Defendants McNutt and Insko were charged. Both McNutt's and Insko's horses were omitted in the betting parameter. McNutt was riding the worst horse in the race and finished 6th while Insko finished 7th. Fontaine, who was driving the favorite in the race, finished last but as stated, he was not a defendant or co-conspirator. (1212-15)

In the February 17th race, Defendants Insko, McNutt, and Hudson were charged. Hudson, whose horse was left out of the

betting parameter, had the second worst horse in the race. He was bet by 1 1/4 million people to finish sixth or seventh. As he finished fifth, he did better that what he was selected to do. (1220) McNutt's horse was bet both in and out of the betting parameter so he was damned if he won and damned if he lost. (1223) The chart also reflected that $18,000 was bet that Insko's horse would finish in the top four and $12,000 was bet that his horse would finish out of the top four. He finished sixth. Additionally, this was another losing day. (1620,1233)

In the February 22nd race, the Defendant Ross was the only one charged. He was driving a horse that was left out of the betting parameter and was the third worst horse in the race. (1252) His horse broke in the beginning of the race which means that it broke its stride and according to the rules of the track, the driver must pull the horse back until he regains his stride. Ross's horse thus finished last. (1255-56)

In the February 27th race, only Defendant Hudson was charged and his horse was keyed in the betting parameter to place in the top four. Hudson finished 8th. (1283) The Defendant Gerry had also bet on this horse to finish in the top four and consequently he lost money on this race. (1283)

In the February 28th race, Defendants McNutt and Insko were charged. McNutt, whose horse was keyed to win in the

betting parameter and was the favorite, in fact won the race. Insko, whose horse was omitted in the betting parameter and who faced long odds, finished sixth. (1286, 1288)

In the March 5th race, Defendants Myer, Insko, and Gilmour were charged. Gilmour's horse, which was keyed in the betting parameter and which was the favorite, won the race. His horse was a logical choice. (1323-1326) Myer, whose horse was bet out of the betting parameter, had the third worst horse in the race. He lost 4th position and finished in 5th position by a nose. (1328)

In the March 8th race, both Defendants Webster and Gilmour were charged. Gilmour, whose horse was keyed in the betting parameter and was the favorite, won the race. He gave the horse that he was driving a lifetime record in this race. (1340) Webster, whose horse was bet out in the betting parameter and was the second worst horse in the race, finished 8th.

In the March 13th race, only Defendant Abbatiello was charged. His horse, which was the second favorite, was left out of the betting parameter and finished fourth. Since his horse was bet out, all the bets were lost. (1399-1401)

In the March 14th race, only the Defendant Webster was charged. His horse, which was left out of the betting parameter and was the third favorite, finished 8th. However, his horse broke as he was coming down the stretch and he therefore had to slow him down to calm him. This horse, driven by a different driver in the March 6th race, also broke in that race. (1404, 1407-08)

In the March 31st race, Defendants Abbatiello, Gilmour, and Cormier were charged. Cormier, whose horse was left out of the betting parameter and was the second worst horse in the race, finished 7th. His horse had not been driven in six weeks and in its last race when driven by a non-defendant and non-co-conspirator, it finished 6th. (1501-02) Gilmour, whose horse was left out of the betting parameter and was the second favorite, finished 5th. He was driving a horse that on March 21st had been scratched because of lameness. (1505) While the public viewed the horse as the second favorite, handicappers would consider that the horse was not sound. (1506) Abbatiello, whose horse was left out of the betting parameter and who had the worst horse in the race, finished 8th. (1492)

In the April 5th race, only Defendants Webster and Insko were charged. Insko, whose horse was left out of the betting parameter and was the favorite, finished 7th. However, during the race, he was forced to the outside which meant that he had to go a long way to win the race. (1652-53) Webster, whose horse was also left out of the betting parameter and had the third worst horse in the race, finished 6th in a dead heat.(1531) In this race, only a nose separated the 4th, 5th, and 6th place horses. (1533)

In the April 6th race, the Defendants Insko, Abbatiello, and Gilmour were charged. Gilmour, whose horse was keyed in

the betting parameter and had the second favorite, won the race. Insko, whose horse was left out of the betting parameter and was the third favorite, finished third. Abbatiello's horse was keyed both in and left out of the betting parameter. This was an extremely close race. The first and second place horses logged the same time and the next four horses logged the same time. (1539)

In the April 10th race, the Defendants Abbatiello and McNutt were charged. Abbatiello, whose horse was left out of the betting parameter and had the second worst horse in the race, finished 7th. (1549) McNutt, whose horse was keyed in the betting parameter, won the race. The horse he was driving won five races in a row. (1550-51)

Dr. Arthut Yaspan was contacted by the Government and agreed to do a study leaving out the two longest horses in an eight horse race in 1972.* By analyzing 72 races, he ascertained which were the two weakest horses as measured by the final odds at post time. (6166-67) By using this system, he determined that if he had bet $1,080 and used each of the six horses left, he would have incurred a 20% loss. (6168) He then ascertained the effects of buying 40 tickets for a combination bet and found that he would

* Mathematician's testimony was introduced over objection (6108-6110, 6139, 6153)

have sustained a 35.6% loss. (6169)

On cross examination, the witness admitted that if he were an OTB bettor and as OTB closed at 6:30 p.m., he could not know for certainty which horses he thought to be the two weakest horses. (6177) Additionally, his study did not take into account post position of the horse, whether a leading or inexperienced driver was on the horse, the past performances of the horse, or the quality of competition. (6185-86, 6336)

Finally, Dr. Yaspan acknowledged that he was not an expert on racing and even more important, when asked based upon his scientific experiments whether he could beat the races, the witness answered "probably". (6352)

MAJOR PLAYERS

DAVID KRAFT, who had previously owned, raised, and raced horses but was barred from this occupation on account of a prior conviction, testified that in January of 1973, Pullman came to his office and told him that Defendant Gerry was fixing Superfecta races and could do anything with any driver if Kraft would loan them enough money to set them up.(4217-18) Subsequently, Pullman telephoned him and asked if he had $3000 to bet on some horses in the Superfecta that Gerry had given him. Kraft stated that he had no money but took down the numbers of the horses and was "stunned" to find the next morning that those horses had placed in the specified order that had been given to him. (4218)

He thereafter placed a series of bets on information that Pullman supplied to him. After February 2nd, however, he dealt directly with Defendant Gerry who would call him at his home and tell him which horses to bet. (4236)
When on March 2nd, the races moved from Yonkers to Roosevelt Raceway, Defendant Gerry said he would do better since he could reach the French Canadian drivers through the Defendants Turcotte, Webster, and Popfinger. (4340-4342)

From February 1st to April 13th, he lost money betting on the Superfecta and told Gerry that he was upset.

On cross examination, Kraft admitted that because he had been losing money, he had to borrow money and admitted testifying before the Grand Jury "I went to my own bank to borrow money before I knew I was involved in a sucker's game". (4420) Kraft specifically stated that he "absolutely" would have quit the scheme if he knew that others had also been betting on Gerry's information. (4640-41) When asked again if he were the victim of a "tout scheme", the witness responded "I was a victim of something". (4650)

Government then informed the court that he had spoken to the witness after he had testified on Friday and asked why he did not think it was a tout scheme. The witness had responded that Pullman told him that Gerry was providing information to a man named Richie who was related to the mob and you don't tout the mob. The Government conceded that this

offer of proof was "highly prejudicial and yet highly probative". (4667, 4744, 4740) He also conceded that it was a ticklish situation. (4740) When counsel asserted that the prejudice far outweighed the probative value, the Government acknowledged seeing counsels' points about the prejudice but claimed it was relevant. The court responded "I am afraid that is so". (4742-43)

When upon further argument by counsel that Kraft had already answered on redirect that he did not think it was a tout scheme and that he unquivocally stated that he never heard that anyone else was betting on Gerry's information else he would have quit, the court at first refused to permit the evidence at the risk of serious error. (4748-59)

When Government stated it would try to frame its questions to minimize the prejudicial effects of such testimony, the court stated it would receive the statement. (4825)

On redirect, Kraft testified that sometime in March he was complaining to Pullman about the amount of money he was betting in comparison to the small returns. Pullman then told him that Gerry was betting huge amounts of money with other people throughout the five boroughs of New York, especially someone by the name of Richie Perry (Appellant) who was betting tremendous amounts of money for Gerry. Since Pullman was

cashing tickets for Gerry, he was aware of the situation. (4842) When Gerry came to Kraft's home in August, he denied knowing Appellant Perry. (4843)

On recross by Appellant Perry's counsel, Kraft was asked whether Mr. Pollack (Prosecutor) had asked him to remember the name of Richie Perry. (4876) The witness denied this and specifically stated that he did not discuss his prospective testimony with the Government on Friday, Saturday or Sunday and it was only that morning that he told Pollack about Appellant Perry. (4878)

The Government then contended that in light of this cross examination implying that the witness fabricated his testimony, it would have to reveal the full statement. Argument took place as to precisely when Kraft informed the Government of the information regarding Appellant Perry. The Government represented that he had asked the witness the previous Friday (April 19th) after he had testified why he did not think it was a tout scheme. Because so many people were "milling" about, he never got an answer. Accordingly, he again asked Kraft that Sunday (April 21st) on the telephone why he did not think it was a tout scheme and Kraft then told him that he had been informed by Pullman that Gerry was providing information to Richie who was related to the mob and you don't tout the mob. (4878, 4887)

Over objection, the court permitted the Government to elicit the testimony. (4849)

Kraft, again recalled, testified that he did not believe that it was a tout scheme because the drivers finished where they were supposed to. Before giving the second reason, the court gave the jury the following instruction:

> What the witness is going to say relate to what Mr. Pullman told him, which you may find was in furtherance of, and during the course of the conspiracy, but it does not follow it is true, or that the statement with respect to Mr. Perry, or of anybody connected with him, are true. It relates only to the state of mind of Mr. Kraft in relation to his continuing in the scheme for the period of time that he did. (4926)

Kraft then stated that the "second reason I didn't think I was in any tout scheme was that when Mr. Pullman told me about Mr. Perry, he also added that Mr. Gerry was betting with Mr. Perry who is connected with a fierce mob in Brooklyn."(4927) Immediately, counsel moved for a mistrial claiming that it was outrageous that the court should permit such a statement. (4927) The court instructed the jury that there was no evidence that any defendants were connected with the mob. (4931)

BRUCE CUSSELL, who was 28 years of age,first met Appellant Perry in the 6th grade in public school and had known him off and on all of his life. (3571)

Commencing in February or March of 1973, Appellant Perry paid him $200 per week to buy OTB Superfecta tickets for him. (3571) His day would usually consist of the following: in the morning, he would bring the New York Times, breakfast,

and a trotting sheet for the next day's races to Appellant Perry's house in Brooklyn. (3572-3573) Gerry would usually call at about 11:00 or 12:00 A.M. and he would overhear Gerry giving Appellant Perry two dead horses for that night at the trotters and a live horse that would finish first or second. (3574)* Appellant Perry would then mark his trotting sheet by putting a circle next to the dead horses and an X next to the live horses. (3575) After Gerry's call, Appellant would call both Michael Sherman and Defendant Vario and give them the combinations that they were to play that night. (3585-3586) After he had called the Defendant Vario, Appellant Perry would give him between $9,000 and $15,000 together with slips indicating the play for that day.

According to Cussell, Appellant Perry had told him that he had fixed races with Gerry and that Gerry would contact the drivers and give them either $1,000 or a winning ticket. Among the drivers who were accepting money, Cussell named Defendants Webster, Foldi, Del Insko, Myer, Hudson, Ross and Abbatiello. (3570-3579)

Cussell also maintained that he had heard a conversation between Appellant Perry and Defendant Vario regarding the fixing of horses and how Gerry was in on the scheme. There was also another conversation between these men regarding getting new people to cash tickets since they did not trust the people who were presently working for them. (3611, 3614) He even overheard the Defendant Vario and Appellant Perry quarreling over the price to be paid to the Defendant Ross who wanted $2000

* There was an objection to this testimony on the ground that is was impossible for the witness to overhear what Gerry was allegedly saying on the telephone. (3575)

instead of the usual $1000. (3634) Finally, it was agreed that they would pay Defendant Ross the $2000 (3631).

Finally, the witness related that in February of 1973 because they were losing money on the Superfecta tickets and needed more money, Appellant Perry telephoned the Defendant Hawthorne and they discussed how much money should be flown in from Rhode Island in order to purchase Superfecta tickets. (3619-3620) Thereafter, both Appellant and he met Defendant Hawthorne at the airport and in the car Cussell showed them a newspaper and pointed out the horses that were being fixed to lose. (3621-3622)

On cross examination of this witness, his past and present psychiatric history was revealed.

Cussell who was then 28 years of age had first been hospitalized for schizophrenia at the age of 16. (3569) He was presently confined in an institution for the mentally disturbed and had been in a total of four different mental institutions. (3700-3701) He was also under the influence of drugs which he took regularly to calm him. (3671-72)

Cussell was unable to recollect many facts regarding his mental condition. He denied having hallucinations or delusions and denied hearing voices telling him they were going to harm him. (3669) Finally, after intensive questioning, Cussell admitted that he imagined that people were talking to him and that this would occur about once a month. (3693) Cussell then attempted to qualify his answer by stating that he heard such voices only once every two years and ultimately, he denied having any hallucinations in the past six years. (3695) After having his recollection refreshed, Cussell admitted that he might have had hallucinations in the last year when he

admitted to the hospital that he was hearing voices telling him to kill himself. (3700) Cussell, however, could not remember telling the Doctor upon his admission to Payne Whitney Psychiatric Clinic in March of 1967 that he was seeing and hearing things. He did not remember telling a Doctor in 1968 that he was "seeing people in different forms". (3743) The witness attempted to explain that it was hard for him to remember these things but he insisted that he could remember the events relating to the race fixing. He stated that he could remember what had occurred last year but could not remember what occurred a while ago. (3745) However, Cussell still could not remember telling a Doctor upon his admission to the hospital in June of 1973 that he was "freaked out, disoriented, and confused". (3746) He could not remember telling a Doctor upon his readmission to Brooklyn State Hospital on June 27, 1973 that he was suffering from auditory hallucinations. (3750) Furthermore, he could not remember telling a psychiatric social worker in July of 1973 that he had god like powers over other people and that he was very hostile to people. (3735) He also could not recall saying "insanity is Utopia". Even when readmitted to Brooklyn State Hospital four months ago, Cussell could not remember running nude around his home last year which prompted his parents to admit him to Brooklyn State Hospital. (3674) He denied setting his hair on fire and claimed that he merely put a match to it and blew it out in front of an orderly. (3702) He did admit

that one and a half years ago, he had threatened to destroy himself by jumping out of a window while confined in the hospital but he was stopped again by an orderly. (3670)

According to this witness, in April of 1972, he was admitted to a hospital for several months and on December 22, 1973 was again admitted to a hospital where he spent the next three months. He insisted that he was well during January through March of 1973. (3678,3681)

Cussell admitted that when questioned before the Grand Jury, he responded only by stating yes or no to questions put to him by Mr. Meyerson. (3691) Before testifying in the present case, he met with the Government Prosecutors for seven consecutive days, spending one and a half to two hours each day with them. He was then returned to Washington for the weekend and again on Monday met with the Government to discuss his testimony. When counsel asked "Would you agree with me that they were drumming it into your head, all of the same reports, the same grand jury testimony, same statements", Cussell responded "yes". (3814) Cussell considered himself an important witness in this case. (3691)

Counsel thereupon moved to disquality this witness on the ground of mental incompetency, pointing out again that he could not remember recent events and that his testimony was full of contradictions. (3766) The Government responded that the letters from St. Elizabeth Hospital where Cussell was presently confined showed that this man could testify from memory without impairment due to psychiatric problems. (3766) The court

refused to adjudicate Cussell insane. (3781) At a subsequent point in the trial, counsel pointed out that the letters stating that Cussell was competent were sent without notice to the defendants. (4030) The court construed this as a request to cross examine the doctors to which counsel agreed. (4031) The court, however, stated that the defense should bring doctors in to testify on their case. When counsel questioned why the burden was on them, the court responded that they were attacking the Government witness. (4031)

Three witnesses for the Government, Seymour Rothstein, Joseph Pullman, and Marvin Proman recanted their Grand Jury testimony, claiming that the Government coerced said testimony. Nevertheless, the Government elicited damaging testimony from two of these witnesses regarding Appellant Perry. Over objection, Pullman was asked whether he told the F.B.I. that "Richie whose last name you didn't know but who Gerry on several occasions referred to as the son of a made man in Brooklyn," Pullman responded "I never called a man a "made man" in my life. That's your statement and you people put that statement". (6853) Prior to this the Government instructed the jury that the statement did not constitute evidence that Appellant Perry was in fact a member of any organization. (6842) Proman in turn was questioned repeatedly as to whether he told the "FBI with regard to Richie Perry, you stated that you knew Perry as an individual who used to go to Sherman's room at the Carvel Inn? You stated you knew Perry as a bookmaker." (7827) Although the question was objected to and the court instructed the jury that questions were for impeachment purposes only, the court

thereafter permitted Agent French to testify that Proman had told him that Perry was a bookmaker. (7827, 8166)

DEFENSE - Several different witnesses were produced by the defense who had judged all the Superfecta races and who specifically stated that after viewing the films of the races and the races themselves, they observed no wrongdoing. One witness, George Levy, President and Chief Executive of Roosevelt Raceway, testified that even before there was any suggestion of any wrongdoing, he suggested to Howard Samuels that the Superfecta be terminated because he felt that a good handicapper with money could beat the races as it was presently set up. (8444-47)

GOVERNMENT MISCONDUCT

In the midst of the trial, Mr. Bobick, counsel for Defendant Gerry, informed the court that on April 16, 1974, Mr. Pullman appeared at his office and disaffirmed any knowledge of race fixing. (5295-5336) At this time, Pullman agreed to conceal a tape recorder on his person for the purpose

of taping Government conferences with the witnesses, Kraft and Rothstein. (5295-96) Accordingly, Pullman taped conferences in the Government office on April 18th, 19th, and 21st. (5276) These tapes were marked as Defendants' exhibits K, L, and M. (5278)*

Statements on the tape reflected the following:

> an Agent telling Pullman that Pollack controls the judge; representations that Pollack and the Judge are "real good" friends; (D-34-35, 113-114, 116-117) statements that Pollack had the Judge in his "hip pocket"; (D-117-120) Pollack's guarantee that Pullman will not go to jail and his assurances to Pullman that he is close to the Judge since the Judge had written his letter of recommendation for admission to the New York Bar; (D-210-217); Prosecutor Meyerson's referral to the Judge in this case on a first name basis when he stated "tell him how close Michael and Orrin are"; (D-120)

Additionally, Appellant Perry's counsel pointed out that the tapes specifically contradicted the Government's assertion that he had not spoken to Kraft regarding why he did not think it was a tout scheme until the following Sunday. (5354) (D-59-71, 92-96, 103-05)

The court at first was uncertain how to proceed in this matter. (5278) Defense counsel moved for a dismissal of the indictment on the ground of gross prosecutorial misconduct, claiming that the total circumstances offended any sense of justice. (5283) Alternatively, counsel requested an immediate

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* Transcripts of the tapes are set forth in Appendix D. Numerical references preceded by the letter D are to the pages of said Appendix.

hearing, to see if the Agents and the Prosecutors would admit to the improprieties. (5284, 5363)

After listening to the tapes (5344-5350), the court concluded that although there were some matters in the tapes that were disturbing, there was no reason to dismiss the indictment. (5374) The court, however, did indicate that it was improper for Mr. Pollack to state that the court had written a letter to the Bar in his behalf as indicating any likelihood that he could get anything from the court. (5350) Mr. Pollack in turn stated: "I agree with the court that there are things said by myself which are improper."(5351)

Thereafter, counsel again urged the court to reconsider its motion for dismissal, claiming that the court's integrity had been impugned. The court responded that because someone "insults me I must dismiss a case". (5533) Whereupon, counsel asked the court to take a position on each allegation affecting the court's integrity rather than just stating a general denial, but this request was denied. (5535-36)

Court thereafter held that if the tapes were to be used on cross examination, there should be a transcript. (5362) When Appellant Perry's counsel requested permission to play the tapes before the jury and then question Agent Dillon regarding Mr. Pollack's conduct, the court refused to allow this. (7400) When counsel then tried to question Agent Dillon

regarding Pollack's conduct, the court stated that Pollack was not on trial. (7403) At this point, counsel stated that he would reserve cross examination until the court permitted the playing of the tapes. (7404) Similarly, counsel's request to play the tapes in cross examining Agents Gianturco and French were denied. (7450, 8250-52) Counsel protested that he did not need a transcript to introduce the tapes into evidence and it was highly prejudicial for the court to refuse to allow him to show that Agent French was a liar. (8251)

SENTENCE - In a motion for a new trial, counsel claimed that he had spoken to juror #2 after the verdict had been reached and had been informed by this juror that appellant was convicted because the jury believed him to be an "enforcer for the mob". This conclusion, Mr. Waters explained, was based upon the statements made during the trial about the "fierce mob" and reference to Appellant Perry as a bookmaker.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT PERRY COMMITTED ANY CRIMES.

An examination of the entire record in this case establishes beyond cavil that the Government's proof fell far short of establishing that Appellant Perry knowingly conspired to participate in any scheme to fix the outcome of the Superfecta races by bribing the drivers. Instead, the bulk of the evidence relied on by the Government to support their theory that the drivers were bribed is equally consistent with the defense theory that Appellant Perry was relying only on Defendant Gerry's expertise as a handicapper in his effort to beat the races.

At the outset, it is readily conceded that the Government established that Appellant Perry was a gambler with money to invest and that Defendant Gerry would relay his racing selections to various people including Appellant Perry who would then bet large sums of money at different OTB parlors throughout the city. If their wagers were successful, other individuals would then be given the responsibility of cashing the winning tickets, admittedly to avoid payment of taxes. This was the sum total of Appellant Perry's involvement and from this conduct alone it cannot be inferred that he had any knowledge of any bribery scheme.

Neither the conduct of the races nor the fact that Appellant Perry used Gerry's racing selections to place his bets proves that he knowingly participated in any bribery scheme.

Since there was no proof that the Defendant drivers received any bribes, it is understandable that each and every driver was acquitted. It appears that the Government randomly selected the drivers who were to be charged with a particular race since it is impossible to determine why a particular racing result warranted charging a particular driver with being bribed in that race.

It is also evident that Appellant Perry could have readily believed that Gerry's racing selections were the choices of a good handicapper rather than the product of any bribery. The majority of horses omitted by Gerry were among the worst horses in the face, facing the longest odds or having some obvious injury or other handicap which would have made them a logical choice to omit. At other times, horses which were left out of the betting parameter missed placing in the race by only a nose or a neck or else the race was so close that the time logged on the horses were the same and it took a photo to determine the winners. Likewise, an analysis of the races shows that the horses which Gerry keyed to win were usually a logical choice, given the horses' odds and its previous racing history. Most important, however, each race was closely supervised by judges and no

suspicious conduct on the part of any of the Defendant drivers was ever reported. Even when asked to view films of the races, the judges still could not see anything wrong. Considering that 40 Superfecta races were allegedly fixed coupled with the additional factor that so many Defendant drivers were allegedly bribed to finish in a specified position, some suspicious conduct on the part of at least a few of the drivers would have been noted.

Although the conduct of the races would not provide the slightest hint of any impropriety, the Government still insisted that the betting patterns established by the defendants gave rise to the inference that the races were fixed. Yet, the Government failed to show whether the other bettors at OTB or the track used the same or a different pattern. Before any inference of wrongdoing can be inferred from the betting patterns, it was necessary for the Government to first establish the betting patterns for the other bettors so there could be some basis for comparison. Failing this, it cannot be said that the betting patterns could give rise to any inference that the races were fixed.

In a further somewhat abortive attempt to bolster its theory that the betting patterns indicated that the races were fixed, the Government offered its mathematical expert who professed the opinion that consistently leaving out the two longest horses in a race would not produce winning results. This expert's opinion was indeed specious since the defense never maintained that Gerry was leaving out the two longest horses

in the race but throughout the trial insisted that he was also using his own specialized knowledge in making his selections. In any event, the expert's system could not have been put into effect at OTB since the odds used to determine the long-shots by Dr. Yaspan were the odds at post time and the OTB which closed before that time did not have access to these odds. However, this witness negated his purpose in testifying when he stated that based upon his system, he could "probably" beat the races. (6352) If a mathemetician with no racing background could beat the races, then certainly Gerry who was an acknowledged expert in the field should also have been able to lawfully beat the races.

Finally, if the races were truly fixed as the Government contended, it is difficult to understand why there were only 22 winning days but also 18 losing days for the Defendants and Co-conspirators. (1677)

Based on all this evidence, it can only be said that the Government proved that a good handicapper with money to invest could beat the Superfecta races. This conclusion was supported by the uncontroverted testimony of Attorney George Levy who stated that well before there was any talk of corruption, he felt that a good handicapper with money could beat the Superfecta as it was presently set up. In order to avoid this problem, he had urged the Commission to set up a 16 horse Superfecta race.

Thus, even considering the Government's charts, its analysis of the races, and its mathematical expert, it still cannot be said that the Government produced sufficient evidence to establish that Appellant Perry knowingly participated in any bribery scheme.

The only testimony in this entire record connecting Appellant Perry with any knowledge that the races were fixed was the testimony of Bruce Cussell, a man who not only had a long and serious psychiatric history but who had been transported from a mental institution to give his testimony at trial. It must be conceded that absent Cussell's testimony, the Government's case against Perry would not stand since the evidence relating to the races and the placing of bets by Perry is so neutral that it cannot support any conviction.*

While it is recognized that it is this Court's practice to view the evidence in a light most favorable to the Government, it is submitted that the extraordinary facts of this case mandate that this Court take the unusual step of reviewing the credibility of witness Cussell and for the reasons set forth in POINT II of this brief, such a review by this Court should result in an outright rejection of his testimony in its entirety, thereby mandating the reversal of

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* It should be noted that the fact that Appellant Perry associated with Gerry and attended a party for Defendant Insko is not sufficient evidence of his knowledge of any bribery scheme for mere association with actual conspirators does not make a person a member of a conspiracy. United States v. Kompinski, 373 F.2d 429 (2d Cir., 1967); United States v. Fantuzzi, 463 F. 2d 683 (2d Cir., 1972)

Appellant Perry's conviction. United States v. Mesarosh, 352 U.S. 1 (1956)

POINT II

THE COURT'S FAILURE TO HOLD A HEARING TO DETERMINE WHETHER GOVERNMENT WITNESS, BRUCE CUSSELL, WAS A COMPETENT WITNESS REQUIRES THE REVERSAL OF APPELLANT PERRY'S CONVICTION.

The only evidence in this voluminous record connecting Appellant Perry with the crimes charged was the testimony of Bruce Cussell, a man who not only had a lengthy history of mental illnesses but who was also a patient in a mental institution at the time his testimony was tendered. Despite the fact that the court was well aware of Cussell's precarious mental state, the court failed to hold a hearing regarding Cussell's competency to testify.* The court's failure to hold such a hearing now requires the reversal of Appellant Perry's conviction.

It has long been settled that a witness must be competent to testify. "A fortiori, once a judge is confronted by any 'red flag' of material impact upon the competence of a witness, an inquiry must be made into the facts and circumstances relevant thereto." United States v. Crosby, 462 F.2d 1201, 1202-03 (D.C., 1972); United States v. Benn, 476 F.2d 1127 (D.C., 1973); United States v. Tannuzo, 174 F. 2d 177 (2d Cir., 1949); Henderson v. United States, 218 F.2d 14 (6th Cir., 1955).

* It should be noted that counsel requested that such a hearing be held (2407-08)

The very nature of Cussell's illness should have put the court on notice that some examination regarding his competency was warranted. This was not a witness who simply had a prior history of mental illness. See United States v. McFarland, 371 F.2d 701 (2d Cir., 1966) This was a witness who from the age of 16 to the present had been diagnosed as a schizophrenic and who had been confined in four different institutions. This was also a witness who had been confined in such an institution both immediately before and after the period encompassed in the alleged conspiracy and had even been taken from a mental institute while under the influence of drugs in order to testify at the trial. To believe Cussell, one would have to accept that the dates between February and April 1973 were one of his few lucid periods. Moreover, Cussell admitted, albeit reluctantly, and the psychiatric reports so reflected the fact that he experienced frequent hallucinations and heard voices telling him what to do. And even more revealing are his many past acts which at best can only be characterized as the bizarre conduct of a sick man.

Although the court was well aware of these facts before the witness testified, the court was of the opinion that it was up to the jury to determine the question of Cussell's competency. The court evidently confused its responsibility to determine competency with the jury's duty to assess the credibility of a witness. Both are separate functions. It's only after the court makes the determination that a witness is competent that it then remains for the jury to assess the

credibility of the witness and determine the weight to be given to his testimony. This rule was succinctly set forth in United States v. Henderson, 218 F.2d 14, 17 (6th Cir., 1955) wherein the Court stated:

> The question of the competency of a witness is for the court, not the jury. If the competency of a witness is challenged before testifying, it is the duty of the court to make such examination as would satisfy it of the competency of the witness. The form of the examination rests in the discretion of the court.

In denying counsel's applications for a hearing, both the court and the Government relied on the psychiatric reports wherein it was stated that Cussell could testify from memory without impairment due to psychiatric problems. Their reliance was misplaced.*

First, the fact that Cussell could testify from memory did not preclude the very real possibility that his illness could cause him to distort facts, thus rendering any testimony he might give inherently untrustworthy as a matter of law. This distinct possibility is not without support in this record. Cussell's testimony was equivocal, contradictory, and conspicuous for its lack of recollection. The court after direct examination of this witness remarked to counsel "you can argue that the testimony is inaccurate and you may have some basis for it", (3648) or "I think there are a number of features of this witness' testimony that the jury can certainly consider bearing, on the truth or accuracy of his recollection." (3647) In this

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* The psychiatric reports are set forth in Appendix C.

regard, Cussell's assertion that he could overhear Defendant Gerry telling Appellant over the telephone which horses to bet clearly defies belief and is especially suspect since an admitted symptom of Cussell's illness was his hearing of voices. Counsel, recognizing this, immediately moved to strike his testimony at that point.

Furthermore, it is obvious that the Government went to great lengths to prepare this witness. Before the Grand Jury, Cussell's testimony was limited to simple yes or no answers and before testifying at trial, he met with Government Prosecutors for seven consecutive days and agreed with counsel's inquiry that "they were drumming it into (his) head, all of the same reports, the same grand jury testimony, same statements". (3814) Such extensive coaching had to have a tremendous impact on this vulnerable witness who without a doubt was highly susceptible to suggestion.

Second, although counsel requested that they be permitted to cross examine the Doctors who prepared the psychiatric reports, the court denied the request. Only by cross examination could the credibility and the truthfulness of these reports be properly ascertained. See Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

Finally, even assuming that it was within the jury's province to determine whether Cussell was a competent witness, the Government in its summation and over objection usurped this function when it stated regarding Cussell's testimony:

> I think you can infer that there was a determination made before he testified that he was competent to give testimony. (9844-45)

In light of the court's refusal to hold any hearing, the Government's assertion that a determination regarding Cussell's competency had been made before he had testified was not only misleading but was inaccurate. The prejudice was compounded when the court failed to issue any corrective instruction and thus let the jury assume that the question of Cussell's competency had already been determined.

Thus, as Cussell was the Government's key witness against Appellant Perry, the failure of the court to hold a hearing regarding his competency constituted reversible error.

POINT III

THE DELIBERATE ELICITATION BY THE PROSECUTION OF EVIDENCE THAT APPELLANT PERRY WAS ASSOCIATED WITH THE MOB DESTROYED ANY POSSIBILITY OF HIS RECEIVING A FAIR TRIAL.

Of all the defendants in this case, only Appellant Perry was singled out by the Government and ominously labeled a mobster. The Government deliberately elicited testimony that Appellant Perry was connected with a "fierce mob" in Brooklyn and that he was the son of a "made man". Further testimony by Government witnesses established that he was engaged in the illicit trade of a "bookmaker". After hearing such evidence with its sinister connotations, the jury had to be convinced that Appellant Perry was capable of committing any crime including the crimes for which he was on trial.

This type of evidence is so inherently prejudicial that under no circumstances should the court have allowed it to go before the jury. By permitting such testimony, the Government was in effect establishing Appellant Perry's guilt through his reputed association with one of the most feared groups known to the public - the "Mafia". To prove a defendant's guilt by his alleged association with any group, let alone the mob, is clearly repugnant to any concept of Due Process and such practices have been condemned by the Courts. See United States v. Tomaiola, 249 F.2d 683 (2d Cir., 1957) [where this Court held it reversible error for the Government to paint the defendant as a bad man associated with criminal companions who would do most anything]; United States v. Vaught, 485 F.2d 320 (4th Cir., 1973) [where evidence of defendant associating with criminal companions was so prejudicial that it tainted the entire trial]; United States v. Plante, 472 F.2d 829 (1st Cir., 1973) [where a witness referred to the defendant as having been in jail did not require a reversal only because the court immediately ordered it stricken and instructed the jury to disregard it] CF. United States v. De Masi, 445 F.2d 251 (2d Cir., 1971), and Carbo v. United States, 314 F.2d 718 (9th Cir., 1963)*

No valid reason can be advanced to justify the admission of such damning evidence. Since initially the court was not predisposed to risk serious error by permitting the Government

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* These latter cases which permitted references to "racketeering" were prosecutions brought under the Hobbs Act which was specifically enacted to deter racketeering. In this case, the charges of race fixing bore no connection to mob activity and therefore its extended use cannot be justified.

to elicit this testimony on its redirect examination, it cannot be claimed that Appellant's recross of Kraft opened the door to this prejudicial testimony. Counsel only attempted to bring out on his recross that his client's name had been suggested to this witness by Mr. Pollack over the weekend. This was a legitimate attack on the credibility of this witness and had nothing whatever to do with the mob. Even assuming that the Government was correct in contending that this recross constituted an attack on Kraft's testimony as a recent fabrication, Kraft's additional testimony referring to the mob did not make it any less of a fabrication and did not thus serve the purpose which the Government ostensibly intended it for.

Moreover, Kraft's deliberate embellishment of his testimony when he added the word "fierce" to describe the mob to which Appellant Perry was allegedly connected should in and of itself compel the reversal of Perry's conviction. The image associated with the phrase "fierce mob" is indeed a frightening one and was without a doubt intended by Kraft to depict before the jury the stereotyped image of the typical mobster.

The prejudice to Appellant Perry was further exacerbated when the Government sought to reinforce Perry's image as a gangster by eliciting additional testimony from other Government witnesses that Perry was the son of a "made man" and that he was gainfully employed as a bookmaker. As the Government presented two admitted bookmakers as witnesses who could hardly be deemed "model citizens", the jury had to associate Perry with the activities of these hardened criminals and had to be convinced at that point that Perry was a dangerous mob member.*

* All the testimony referring to the mob is set forth in Appendix E.

Ironically, although all this damaging evidence focused specifically on Appellant Perry and not on any other defendant in this case, the jury was instructed that the testimony was not to be considered against Perry but was admitted only for impeachment purposes and bearing on Gerry's, Kraft's and Pullman's state of mind. After hearing this deluge of prejudicial and extraneous evidence, the jury could not and did not perform the task of accepting the evidence for one purpose and ignoring it for another. See Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964); United States v. Bozza, 365 F.2d 206 (2d Cir., 1966). It is not even necessary to speculate in this case whether the jury was improperly influenced since one of the jurors after the verdict informed Appellant Perry's counsel that Perry was convicted only because they thought he was an enforcer for the mob. Thus, despite the court's instructions, this testimony regarding the mob did have a devastating and negative impact upon the jury when deliberating upon the question of Perry's culpability.*

Furthermore, not only the use of such evidence must be condemned but the bad faith of the Government in introducing it in the first place must receive equal condemnation. The record establishes that the Government both blatantly misrepresented the facts to the court concerning the acquisition of such

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* It is submitted that the testimony referring to the mob was so prejudicial so as to require a reversal. If this Court, however, decides to the contrary, we submit that at the very least this Court should order a hearing to determine whether the jurors failed to follow the court's instructions that this evidence was not to be considered against Appellent. See Frazier v. Cupp, 394 U.S. 731 (1969); Wapnick v. United States, 406 F.2d 741 (2d Cir., 1969); United States ex rel, Nelsen v. Follette, 430 F.2d 1055 (2d Cir., 1970)

information and knowingly suborned the perjury of its witness Kraft.

The Government (Mr. Pollack) flatly represented to the court that it had asked Kraft for the first time after he had testified that Friday (April 19th) why he did not think it was a tout scheme but because so many people were "milling" about he never got an answer. Accordingly, he again asked Kraft on the telephone that Sunday (April 21st) why he did not think it was a tout scheme and at this point Kraft allegedly revealed his reasons. (4878, 4887) Kraft in turn maintained on recross that he did not discuss his prospective testimony with the Government on either Friday, Saturday or Sunday and it was only that morning that he told Mr. Pollack about Appellant Perry. (4878)

However, the recordings which Pullman secretly made of the Government conferences on April 19th conclusively establish that the Government lied to the court and permitted its witness to lie on the stand. The tapes reveal that Kraft's testimony was in fact discussed in detail by both the Prosecutors in this case and Government agents, and it further reveals that it was the Government who initially suggested to Kraft the reason

why he did not think it was a tout scheme.*

It is difficult to understand why the court did not attempt to correct this wrong since Appellant's counsel specifically brought it to the court's attention that the tapes contradicted the Government's assertions. (5354) The court in ignoring counsel's claim was thus derelict in its responsibility of making certain that a fair trial was being afforded to the defendants, especially Appellant Perry who was the most affected by this evidence.

Finally, the bad faith of the Government in introducing this mob testimony is again demonstrated by the tapes of April 21st which reveal that Pollack knew full well that Perry was not associated with any mob and that he was a straight gambler and not a bookmaker (D200-08) Consequently, the Government wilfully used slanderous and false testimony to aid them in their case.

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* Specifically, the tapes show the after Kraft had finished testifying, he went to Mr. Pollack's office where a discussion ensued concerning how to counter defense's claim that it was a tout scheme. Kraft first suggested that both the charts and the numbers given to him which showed up exactly as they said refuted the existence of a tout scheme. Mr. Pollack in turn felt that a better answer was the aura surrounding harness racing and revealing Kraft's extensive background in this area. To this Kraft responded that he could not say that and asked Mr. Pollack whether he was saying that all races were crooked. At this point, Agent Fanning interrupted and queried whether he (Gerry) was touting Richard Perry and the Varios. Whereupon Kraft agreed and stated that the jury would not buy that he was touting the Vario people. When the question arose as to whether the jury would know who the Vario people were, Agent Fanning replied that the jury would know since Vario, the "gold bug", had been in and out of the papers for two years. (D59-71, D92-96, D103-05)

In short, for the Government to have deliberately elicited such damaging testimony under these particular circumstances reveals the desperate measures the Government resorted to in order to secure a conviction in this case. Accordingly, Appellant Perry's conviction which was based on this tainted evidence must be reversed.

POINT IV

THE LAWLESS CONDUCT OF THE GOVERNMENT IN THIS CASE IS SO OFFENSIVE TO THE ADMINISTRATION OF JUSTICE THAT AN ACQUITTAL SHOULD HAVE BEEN ORDERED AS A MATTER OF DUE PROCESS.

It has been repeatedly held that the Government of the United States must not, in its zeal to punish criminals, itself become a law breaker and implicit in such a concept is the notion that the ends do not justify the means:

> " 'In a government of laws', said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private person -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face'."
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> Elkins v. United States, 364 U.S. 206, 223 (1966); quoting from the dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 485 (1925).

In this case, the Government "has stooped to conduct well below the line of acceptability". United States v. Rosner, 485 F.2d 1213 (2d Cir., 1973) The Government committed a series of acts which constituted a clear affront to the integrity of our

criminal justice system and which should compel the dismissal of the indictment against Appellant Perry. CF. United States v. Rosner, supra; United States v. Archer, 486 F.2d 674 (2d Cir. 1973); Hoffa v. United States, 385 U.S. 293 (1966) Coplon v. United States, 191 F.2d 749 (2d Cir., 1951)

The Government in this case acted with a total disregard to the dignity of the trial court and deliberately used the vast power of its office to induce its witnesses to testify against the defendants. Both Government Agents and the Prosecutors (Pollack and Meyerson) represented to Pullman and Rothstein who feared a jail term that they had nothing to worry about as they were the ones who controlled the judge. In fact, one Agent even went as far as making the derogatory comment that Mr. Pollack had the judge in "his hip pocket", and Meyerson displayed his familiarity with the judge by referring to him on a first name basis when he stated to another Agent "tell him (Pullman) how close Michael and Orrin are". Pollack then buttressed these conclusions by telling Pullman that he and the judge had tried many cases together and that the judge even wrote his letter of recommendation to the New York State Bar.

Such conduct cannot be condoned as it represents a very real threat to the integrity of our judicial system. One of the prime objectives of the trial is a search for the truth. It is seriously doubted whether the truth could or would emerge if the Government is permitted to extort testimony from its

witnesses by falsely representing that not only does their office prosecute the crimes but that their office likewise controls the judiciary. Such witnesses, especially if they are also confronted with criminal charges, would have to feel intimidated by the Government's alleged dual function and would feel compelled to tailor their testimony to the Government's vantage.

Apparently that is what occurred in this case. While there is only concrete proof that the Government in the three days which were taped by Pullman deviated sharply from the proper course of conduct, such conduct casts a blanket of suspicion over all its actions in this trial. This is particularly true given the fact that three Government witnesses actually recanted their Grand Jury testimony and claimed that their prior testimony was obtained by threats, intimidation, and coercion on the parts of the Government Agents which resulted in their conforming their stories to that which the Government wanted to hear.

While recantations of witnesses are usually regarded with suspicion in the courts, that suspicion in this case must be directed against the Government since it is highly unusual that three witnesses in one case would recant their testimony for similar reasons.

Confronted at trial with evidence of their misconduct, Mr. Pollack was forced to admit to a "few improprities" (5359). Such conduct went well beyond the bounds of impropriety and

must be considered outright unlawful.

Even more shocking in this case was the Government's deliberate misrepresentation of facts to the court and its willful subornation of perjury of its witness Kraft. (see Point III) What makes this conduct especially outrageous is that it cannot under any circumstance be construed as accidental or inadvertent. Giles v. Maryland, 386 U.S. 66 (1967); United States v. Giglio, 405 U.S. 151 (1972).

Obviously the Government as Prosecutor was dedicated "more to the pursuit of convictions than the pursuit of truth". United States v. Mayersohn, 452 F.2d 521, 525 (2d Cir., 1971) Accordingly, this Court in the exercise of its supervisory powers should rectify the wrong done to the defendants by dismissing the indictment. Mesarosh v. United States, 352 U.S. 1, 14 (1956).

POINT V

THE COURT SHOULD HAVE SUA SPONTE DECLARED A MISTRIAL ONCE ITS INTEGRITY HAD BEEN PLACED INTO ISSUE AT TRIAL.

Assuming that this Court does not consider the evidence of Governmental misconduct to be serious enough to warrant a dismissal of the indictment, it is submitted that once the court's integrity had been placed into issue before the jury, it was incumbent upon the court to sua sponte declare a mistrial.

The court's integrity in this case had been seriously impugned by the Government's actions and the jury was well aware that the court had been directly linked to the Government's

misconduct. In their cross examination of various Government witnesses, defense counsel attempted to bring out the Prosecutorial representations regarding their ability to control Judge Judd. Such questions were relevant to prove that the Government had improperly induced these witnesses to testify and counsel would have been derelict in representing their respective clients if they had not tried to make use of such information.

However, once the jury was made aware of the Government's representations regarding the court, Judge Judd felt it necessary to assure the jury that these allegations, at least with regards to the court, were false. Accordingly, the court curtailed the cross examination of Pullman regarding information on the tapes referring to prosecutorial ability to control the judge and even instructed the jury that it had nothing to do with the selection of the defendants. (7097-98, 7101) Additionally, because the integrity of the court was at issue, counsel felt compelled to ask the court to take a position on each allegation rather than just state a general denial but the court denied this request. (5536)

It is well settled that the Government cannot place its own integrity or credibility in issue before the jury. United States v. Puco 436 F.2d 761 (2d Cir., 1971); United States v. Grunberger , 431 F.2d 1062 (2d Cir., 1970); Hall v. United States, 419 F.2d 582 (5th Cir., 1969); Gradsky v. United States, 373 F.2d 706 (5th Cir., 1967); United States v. White, 324 F.2d 814 (2d Cir., 1963); United States v. Spanglet, 258 F.2d 338 (2d Cir., 1958). A fortiori, it is far worse for the court's integrity to be so contested as the court must remain both

independent and neutral throughout the entire proceedings. The court's honor must remain above reproach.

When counsel urged that the charges be dismissed, stating that the court's integrity had been attacked, the court only responded that he did not have to dismiss the case because he had been insulted. (5533) The issue was not whether the court personally felt insulted but whether it was necessary at the very least to declare a mistrial because these facts were before the jury.

In this lengthy case, the interjection of the issue of the court's integrity, which the jury necessarily had to pass on, added an unnecessary and prejudicial issue to an already complicated fact pattern. Accordingly, Appellant Perry's conviction must be reversed and a new trial ordered.

POINT VI

THE CONDITIONING OF THE PLAYING OF THE TAPES UPON THE AVAILABILITY OF TRANSCRIPTS OF THOSE TAPES UNDULY RESTRICTED APPELLANT PERRY'S CONSTITUTIONAL RIGHT TO CROSS EXAMINE THE WITNESSES AGAINST HIM.

At various points throughout the trial, Perry's counsel sought to play the tapes during his cross examination of the Government's witnesses. (7400, 7404, 7450, 8250) The court's refusal to permit this was predicated upon the failure of the defense to provide an authenticated transcript of the recordings. (5362, 8251) The court clearly erred in requiring that a transcript be produced as a condition precedent to playing the

tapes and such error resulted in a denial of Appellant Perry's constitutional right to fully and effectively cross examine the witnesses against him.

Douglas v. Alabama, supra; Pointer v. Texas, supra; Fountain v. United States, 342 F. 2d 849 (4th Cir., 1965).

The authority is overwhelming that original tape recordings are admissible at trial. United States v. Bryant, 480 F. 2d 785 (2d. Cir., 1973); United States v. Greenberg, 445 F. 2d 1158 (2d Cir., 1964); United States v. Leighton, 386 F. 2d 822 (2d Cir., 1967); United States v. Kaufer, 406 F. 2d 550 (2d Cir., 1969); United States v. Kabot, 295 F. 2d 448 (2d Cir., 1961); United States v. Tanner, 471 F 2d 128 (7th Cir., 1972); United States v. Koska, 443 F. 2d 1167 (2d Cir., 1971). While all these cases refer to tape recordings clandestinely made by either a Government agent or its witness in hopes of obtaining incriminating evidence against a defendant, the result cannot be otherwise merely because it is the defense who succeeds in catching the Government in a compromising position.

Moreover, it has never been held that production of the transcripts is a condition precedent to the playing of the tapes. In fact, in many cases, it was the introduction of the transcript that was contested as prejudicial and not just the playing of the tapes. United States v. Bryant,

supra; United States v. Koska, supra; United States v. Carson, 464 F. 2d 424 (2d Cir., 1972); United States v. Fountain, supra. The transcripts traditionally have been used only as an aid to the jury in understanding the tapes.

While the court exhibited confusion regarding how to proceed in this matter, there was no valid reason for the court to prohibit the playing of the tapes during Appellant's cross examination of the Government witnesses. There was never any claim that the tapes were inaudible nor was it asserted that they were in any way untrustworthy. Monroe v. United States, 234 F. 2d 49, 55 (D.C. Cir., 1956); cert. denied, 352 U.S. 873; United States v. Bryant, supra. And if any confusion existed as to who was speaking on the tapes, Pullman who was present during all the conversations, could have readily identified the parties.

Moreover, the Government was permitted to capitalize on the court's erroneous holding by repeatedly ridiculing and demeaning the defense efforts to legitimately play the tapes before the jury. The Government stated:

> Now with the need of a transcript and the telling of this to the jury and all counsel knew that no tapes would be played without transcripts. Yet you heard constant grand stand plays put the tapes in ..... So the Government at the end of the case, said put the tapes in, but court stated without transcript will be no tapes. The Government didn't stand up and scream in your ear during the course of the proceedings, put them in, although we knew they could not go in. (9918-19) (emphasis supplied)

Despite counsel's vehement objections to such comments, the court permitted the Government to continue:

> Reason why you never heard those tapes in course of the defense case is because in the totality the tapes don't help the defense. (9920)

These inflammatory remarks to the jury which the court sanctioned compounded the prejudice to Appellant Perry since it conveyed the unmistakeable but false impression that Appellant had no legal right to attempt to play the tapes before the jury and was just making a "grand stand play" for the jury's benefit.

Accordingly, the court's refusal to allow the playing of the tapes coupled with the Government's prejudicial comments mandate the reversal of Appellant Perry's conviction.

POINT VII

THE CHARGE TO THE JURY WAS REPLETE WITH PREJUDICIAL STATEMENTS AND READ IN ITS ENTIRETY WAS PARTIAL TO THE GOVERNMENT's CASE.

Portions of the court's charge read precisely as if it were a continuation of the Government's summation. The court not only echoed the exact words used by the Government in its summation, but the court displayed its partiality to the Government's case by unduly emphasizing evidence prejudicial to the defense, deciding crucial issues of facts for the jury, conveying to the jury the unmistakeable impression that the

defendants were guilty of bribery, and unfairly disparaging the witnesses for the defense. Such a charge prejudiced Appellant Perry's Due Process right to a fair trial and now requires the reversal of his conviction.*
United States v. DeSisto, 289 F. 2d 833 (2d Cir.,1961); United States v. Coke, 339 F. 2d 183 (2d Cir., 1964); United States v. Nazzaro, 472 F. 2d 302 (2d Cir., 1973); United States v. Persico, 349 F. 2d 6 (2d Cir., 1965).

In the midst of its charge, the court informed the jury that the Government's case was a "mosaic of lots of bits and pieces of various sizes", thereby copying the exact words used by the Prosecutor in his summation. (10028, F-52)
When counsel objected to such language, the court merely responded that the word "mosaic" occured to the court long before the Government used it. It is irrelevant when the court first decided on the effectiveness of this word. In the exercise of its judicial discretion, its use in the charge was unwarranted since it appeared to be a tacit approval of the Government's summation.

The court continued to display its partiality towards the Government's case when it stated regarding the effects of a joint trial:

---

* Charge is set forth in its entirety in Appendix F. Numerical references preceded by "F" refer to pages of Appendix.

> This has not been an ordinary case. It has been very long and it has involved many defendants, but I do not see how I could have split the case into separate trials.
>
> The joint trial is not in my judgment unfair to defendants, as Mr. McDaniels said yesterday. In fact, a joint trial has some serious disadvantages to the Government, and that has been true here. (9979, F-3)

No citation is necessary to support the proposition that defendants endure far more prejudice by being forced to participate in a mass conspiracy case than ever could be attributed to the Government. In fact, because of the prejudice, many of the defendants in this case moved for a severance but upon opposition by the Government, the motions were denied. (10061) When counsel objected to this comment, the court attempted to correct itself by adding that there were disadvantages to both sides in a joint trial and perhaps the Government had some advantages the defendants did not. (10063) This further instruction did not enlighten the jury as to the pitfalls of a joint trial and did not cure the impression that the court already left with the jury.

Additionally, the court on numerous occasions did not hesitate to usurp the fact finding function of the jury. One of the critical issues to be resolved was whether the betting pattern reflected in the charts gave rise to the inference that the races were fixed or were just indicative of

Gerry's handicapping expertise. The court conclusively determined this issue for the jury when it stated:

> While, as I have said, it is not necessary to prove the success of a conspiracy in order to establish guilt, proof of the accomplishment of the objects of the conspiracy may be persuasive evidence of the existence of the conspiracy. And you may find such proof from the charts that have been offered in evidence. (10,000, F-24) (emphasis supplied)

Continuing to decide the facts, the court in reference to Cussell's testimony stated:

> If you find that he did in fact purchase or cash tickets at the time shown in the charts, you can consider whether the trust which some of the defendants are alleged to have put in him has a bearing on his reliability as a witness in this trial. (10016-17, F-40, 41)

The court thus implanted the idea in the jury's mind that if Cussell could perform the tasks entrusted to him, he might be deemed a reliable witness. Not only was this a determination which the jury should have made without any suggestion from the court but such a statement was inaccurate given Cussell's serious mental history. The issue regarding his reliability as a witness was whether his illness would cause him to distort facts and not whether he could do simple ministerial tasks. This aspect of the charge was particularly damaging to Appellant Perry since Cussell was the key witness against him and the question of whether he was a competent and credible witness was of prime importance.

Again usurping the fact finding function of the jury, the court in reference to Cantor and Perry's testimony stated:

> Even if Mr. Cantor rode to win, after being bribed to stay out of the first four, his acceptance of money from Mr. Gerry would constitute the offense of sports bribery. If you find that he received it. He had then a good hedge. He would get the driver's share of the purse if he came in the first four or he would get Mr. Gerry's money if he did not come in the first four.
>
> Mr. Gerry's conversations with Randy Perry may be construed as an offer for a bribe, even though Mr. Gerry said he was just testing Mr. Randy Perry's honesty. (10,032, F. 56)

The court in regard to Cantor's testimony conveyed both the impression that the court believed that Cantor had accepted the bribe and that Cantor had a good thing going for him either way. Furthermore, it was up to the jury and not the court to determine whether Gerry's conversation with Perry constituted a bribe or whether he was just joking. Instead the court actually made this critical finding for them. Since all the Defendant drivers were acquitted and the convictions of both Defendant Gerry and Appellant Perry depended on whether Cantor or Perry received bribes, it was crucial that the charge regarding these drivers be fair and accurate.

Not content with deciding questions of fact for the jury, the court took it upon itself to attempt to refute almost every point that defense counsel made throughout this trial.

There is no question but that the court wanted to convey to the jury that even if Gerry were a good handicapper, he would still resort to bribery to secure his bets when it emphasized the statement of Prosecution witness Dean:

> The reason why a good handicapper might rely on bribery may be seen from Mr. Dean's statement, that even after you have considered all the logical reasons for making a certain bet, you still have the feeling that something is going to go wrong. (10030, F-54)

Picking this particular statement out of this 10,000 page record to provide a reason why a handicapper would resort to bribery was clearly prejudicial. In referring to Appellant Perry's and Defendant Vario's relationship with Gerry, the court stated:

> If they were in fact betting on Mr. Gerry's recommendations, you may consider whether they would have done so if they believed his recommendations were based only on his handicapping skills and his proper information, with no bribery of drivers to reduce the risk that something might go wrong. (10031, F-55)

This statement was also highly prejudicial since the court was in effect suggesting that Appellant would not bet on Gerry's information without being assured that it was a sure thing. Both these statements were definitely biased in the Government's favor and were arguments that belonged in the Government's summation and not in a charge.

The court then attacked the veracity of the defense witnesses:

> Some of the defendants' witnesses were related to the harness racing industry.
>
> You can consider their interest in protecting the reputation of the industry or their careers in the industry or their investments in harness racing and whether that affected their testimony or their credibility.
>
> For instance, Mr. Levy's statement that he did not have the slightest idea of corruption may reflect his desire not to believe anything bad about the sport which he had devoted the last 30 years of his life. It may have reflected a justified belief in the ability of the judges around the track to see if anything was wrong. (10019, F-43)

These remarks were especially devastating. The court was definitely assuming that the races were fixed and that the defense witnesses were biased in their testimony since they either wanted to protect their own investments or the harness racing industry. By this single statement virtually the entire defense was undermined and the court in effect was continuing the Government's attempt to show that there was an industry defense.

In commenting on the credibility of the witnesses, the court remarked:

> I find very little significance in calling names. You should judge the credibility of specific items of testimony given by individual witnesses. Some defense counsel may call witnesses thieves or liars, but that does not mean that they may not have been telling the truth here or before the Grand Jury. (10,009)
>
> In general, a witness' recollection is likely to be better at a time closer to the event about which he is testifying.

> So testimony given to a Grand Jury or statements made before the Grand Jury appearance may be more reliable than statements made later on.
>
> So you could find that the prior Grand Jury testimony of Marvin Proman and Joseph Pullman and Seymour Rothstein is truthful and that their inconsistent testimony at the trial or even their failure to identity a defendant is either a deliberate failure to remember facts which they did remember or a present failure of memory. And you may consider that they made statements similar to the Grand Jury testimony prior and subsequent and you can consider Agent West's testimony that Mr. Proman had told him in California that his Grand Jury testimony was truthful and that he had been told to take a vacation. (10010, F-34)

This instruction had all the attributes of a good Prosecutorial summation. It effectively undermined defense contentions by stating that although the defense labeled some of the witnesses as thieves or liars, they could still be telling the truth. It imparted its skeptism as to the recantations of the three witnesses and for all practical purposes told the jury that their Grand Jury testimony should be believed and not their recantations. It emphasized Agent West's testimony that Proman had told him that his Grand Jury testimony was truthful and that he had been told to take a vacation. This statement was particularly damaging considering that it was never proved at trial that any defendant issued such a direction. But even more important, the court all but ignored the three witness' protestations that their Grand Jury testimony had been the product of coaching, coercing, and threats of

long jail terms.

Specifically, in regards to Pullman's testimony, the court stated:

> The defendants ask you to infer, because some improper promises have been made to Mr. Pullman, while he was wearing a tape recorder in April of 1974, that his Grand Jury testimony and that of others was similarly induced.
>
> That's an inference you may draw, but in this connection you should consider the motives that Mr. Pullman may have had in carrying a tape recorder after he had talked with one of the defendants and his attorney and the fact that he had once agreed to plead guilty and now wanted to get a grant of immunity.
>
> One thing that I find interesting is that after all the assurances that the FBI agent Mr. Pollack gave Mr. Pullman about not going to jail he did not plead guilty and take his chances on the sentence I might impose. But he insisted on his being granted testimonial immunity and it was granted to him. (10012-13, F-36,37)

Again, the court appeared to be duplicating the very argument that the Prosecution made at trial regarding Pullman's motives for taping the Government conferences. The court in this portion of its charge completely overlooked the outright improper conduct of the Prosecutor and his Agents in making its false promises to Pullman. Furthermore, the court had no right to interject its own personal belief as to what it found "interesting" regarding Pullman's position. The question of Pullman's motivation should have been left to the jury and should not have been a subject for speculation by the court.

When speaking of the Government's obligation not to offer false testimony, the court explained:

> It is unprofessional conduct for a prosecutor knowingly to offer false evidence or to fail to seek withdrawal of such evidence upon discovery of its falsehood. But the credibility of a witness may be attacked by any party, including the party calling him. Since a party rarely has a free choice in selecting witnesses, he might be at the mercy of the witness and the adversary, unless he could impeach a witness that he called, by using prior statements or by other admissible testimony. (10014, F-38)

Here the court clearly minimized the effect of the Prosecutor's possible use of false testimony. It is certainly more than "unprofessional" for the Prosecutor to knowingly use false testimony. It is patently illegal. The court then implied that it was not the Government's fault that they had to rely on such witnesses and if they could not impeach their own witnesses, the Government would be at the "mercy" of the defense. Although given in the abstract, this charge had to refer to the defense since only the Government offered impeaching testimony.

Further evidence that the charge was partial to the Government's case was the erroneous instruction that it was up to the defendants to prepare the transcripts before it could permit the playing of the tapes. (10025) The court stated:

> I have thus far not had any transcripts from the defendants and I have not had any offer by the defendants of tapes that I thought met the requirements of the jury and of clarity and I am not going to permit them to be brought in now by the government without transcripts on rebuttal. (10025, F-49)

Notwithstanding that it was plain error for the court to place the burden upon the defense to provide the transcripts as a condition precedent to playing the tapes (see Point VI), the court appeared to be blaming the defense for not providing a transcript and attributed this as the reason why it would not permit the Government to play the tapes. Again this was the same point that the Government made in its summation stating that defense efforts to place the tapes into evidence was a "grand stand play" since both the defense and Government knew that the court would not permit the playing of the tapes without the transcripts. (9919)

Each and every instance described above was specifically objected to by counsel. As each error was egregious, it must be found that the cumulative effect of all the errors in the charge deprived Appellant Perry of a fair trial.

POINT VIII

THE TESTIMONY PERTAINING TO THE PRIOR SIMILAR ACTS WAS SO PREJUDICIAL THAT THE COURT SHOULD HAVE REFUSED TO ALLOW IT INTO EVIDENCE

The defendants in this case were not only tried on the charges specified in the indictment but they were also tried for the alleged misconduct of the Defendant drivers - McNutt, Webster, and Turcotte - occurring 8 years previously. Over strenuous objection by the defense, the Government was permitted to introduce on its direct case evidence that the

aforementioned drivers had fixed races on 15 to 20 different occasions. Since any probative value such evidence might have had was far outweighed by its prejudicial effects, its admission into evidence must be deemed reversible error.

In order to justify its admission, the evidence pertaining to the prior criminal activity must be closely related in time and subject matter to the charges for which the defendant is presently on trial. United States v. Byrd, 352 F.2d 570 (2d Cir., 1965); United States v. Provoo, 215 F.2d 531 (2d Cir., 1954); United States v. Kaufman, 453 F.2d 306 (2d Cir., 1971); United States v. Wright, 466 F.2d 1256 (2d Cir., 1972); United States v. McCarthy, 473 F.2d 300 (2d Cir., 1972); United States v. Williams, 470 F.2d 915 (2d Cir., 1972). Neither of these criteria were met in this case.

This Court has never sanctioned the admission of prior similar acts where the alleged acts had occurred well over 8 years before the defendants were even charged with any criminal activity. In all the cases before this Court, the prior similar acts offered by the Government were either committed contemporaneously or within a close span of time to the crimes charged. United States v. Johnson, 382 F.2d 280 (2d Cir., 1967) [where prior similar acts were part and parcel of a plan to commit a series of thefts from delivery men of trucking companies]; United States v. Williams, supra [where defendant was charged with filing false tax returns for the years 1966 through 1968 and the prior similar acts

consisting of false statements given to employer occurred within this time span_7; United States v. McCarthy, supra _[where the evidence of hijacking a truck was allowed although defendant was charged only with possession of stolen property contained in this truck_7; United States v. Deaton, 381 F.2d 114 (2d Cir., 1967) _[where Government introduced prior similar transactions and the two acts occurred contemporaneously with the present charges and the third act occurred two years before_7; United States v. Wright, supra _[where defendant was charged only with crimes relating to heroin, but evidence of cocaine was also admitted as a similar act since it was part of the same seizure_7; United States v. Baum and Scapoli, 482 F.2d 1325 (2d Cir., 1973) _[where criminal charges occurred in 1971 and the prior acts in 1970_7; See also United States v. Kaufman, 453 F.2d 306 (2d Cir., 1971); United States v. Ross, 321 F.2d 61 (2d Cir., 1963); United States v. Byrd, supra.

Given the 8 year lapse of time between the alleged prior acts and the present charges, the prior acts were just too remote from the present charges to justify its admission at trial.

Moreover, although the Government raised the general allegation that the races were fixed, the Government at trial offered no proof regarding how each race was fixed. Yet, the evidence offered as prior similar acts included very specific methods of race fixing, one of which was an

alleged injecting of a horse with a drug by the Defendant Turcotte. This certainly cannot be construed as a prior similar act since there was not even the slightest suggestion in this case that any of the Defendant drivers ever attempted to use drugs to win a race. In fact, the evidence offered at trial strongly suggests that it would have been impossible to attempt such an act since the winning horses are always subject to veterinarian tests in order to guard against such occurrences. In allowing this detailed evidence, the court in effect was permitting the jury to speculate that the fixing methods testified to by the Government witnesses were the same methods used by the drivers in this case. Thus, the proof held out by the Government to be prior similar acts was in actuality evidence in chief, filling the conspicuous gap in the Government's case regarding how the races were fixed.

Furthermore, it cannot be argued that this evidence was not considered by the jury against Appellant Perry as it was admitted for a two-fold purpose: It was admitted against the particular driver mentioned to show whether he intended to do his best in each race; and it was admitted against all the defendants to demonstrate that one or two drivers could fix a race. While it was impossible for the jury to so categorize this evidence, it is nevertheless submitted that the probative value of the evidence showing that one or two drivers could fix the race was worthless. The testimony of the witnesses on this subject was garbled and confused

and it is still impossible to glean from this record how one or two drivers could fix a race. Although there was some mention of jockies driving on the "outside" or "shotgun", the jurors still had to be left in the dark regarding the possibility of one or two drivers fixing a race. Aside from the injecting the horse with a drug, the Government failed to show that one driver could fix a race and there are Superfecta races in which only one defendant driver had been charged.

Finally, even assuming that such evidence had some possible probative value, its value was greatly diminished considering the unreliable source of this evidence. The Government offered no reliable proof that these prior acts in fact occurred other than the testimony of two convicted and hardened criminals. Before the Government is permitted to use such devastating evidence, there at least should be some credible proof that the incidents actually occurred other than the naked accusations of two convicted criminals who had everything to gain and nothing to lose by testifying favorably for the Government. Furthermore, these two recidivists were never qualified as experts in the field of racing and therefore should not have been permitted to give their opinion concerning the technical aspects of how one or two drivers could fix a race.

Under such circumstances, the court should have refused to admit into evidence such unreliable and prejudicial evidence.

POINT IX

OTHER ERRORS COMMITTED DURING THE COURSE OF THE TRIAL REQUIRE THE REVERSAL OF APPELLANT PERRY'S CONVICTION.

A. The court erroneously allowed the Government to impeach its own witness' testimony with the testimony of Government Agents.

Rothstein's testimony was impeached by United States Probation Officer Eder and Agent Dougherty. (9010-15, 9026-39, 9014-15). Pullman's testimony was impeached by Agents Dillon and Ginaturco (7381, 7383-86, 7431-36) and Proman's testimony was impeached by Officer West and Agent French. (8161-66) Thus, the trial evolved into a "swearing contest" among the Government witnesses and such contests have been specifically denounced by this Court.

In United States v. Cunningham, 446 F.2d 197 (2d Cir., 1971), this Court held that offers of impeachment testimony similar to the testimony offered in this case would be forbidden since the issue of whether the witness ever made the statements would require the resolving of a swearing contest between himself and the police. United States v. Pacelli, 470 F.2d 67 (2d Cir., 1972); United States v. Caruso, 465 F.2d 1369 (2d Cir., 1972); cf. California v. Greene, 399 U.S. 149 (1970).

In accordance with Cunningham, supra, Appellant Perry's conviction must be reversed.

B. The court improperly allowed the testimony of the mathematician.

By permitting the testimony of the mathematician, the court was allowing Appellant Perry's guilt to be predicated on probabilities, possibilities, or the question of chance. Such testimony vitiated the cardinal principle in every criminal case that guilt must be established beyond a reasonable doubt.

Dr. Yaspan's testimony had no place in this trial. His study encompassed races run in 1972 and not the 1973 Superfecta races which the defendants were charge with fixing, and it was conceded that the expert's system could not even have been used by the defendants even had they deemed it worthy of implementation. But most important, Dr. Yaspan's system was based only on the odds induced by the public who generally lose because of their lack of accompanying racing expertise.

Permitting this witness to give such extraneous and speculative testimony was error.

C. Permitting the Government to try the racing industry along with the defendants constituted reversible error.

Simply because the officials called by the defense contended that harness racing was a closely supervised sport and that no improper actions by any driver were brought to their attention during the running of the Superfecta races, the Government sought to show that this was an industry defense. The court readily agreed with the Government's

position and asserted that the industry was not only on trial but the reputation of the industry as well. (8707-08) Thus, the Government was permitted to show a comparison of the judging of the 1973 races with the 1974 races that revealed that there were more infractions and fouls called in this latter year than in the former year. (8710-12)

It strains credibility that the defendants in this case who were charged only with conspiracy and bribery now had to defend against allegations of corruption against the racing industry by both the Government and the court.

Notwithstanding the impropriety of joining the harness racing industry as a defendant in this case, the elicitation that more violations occurred in 1974 than in 1973 added another collateral issue for the already overburdened jury to determine. Even assuming that more violations existed in 1974 than in 1973, such information was without relevance in this case since none of the Defendant drivers, who were admittedly the most experienced, were driving in 1974.

This improper testimony requires the reversal of the Appellant's conviction.

D. Appellant Perry was denied his right of confrontation under Bruton v. United States, 391 U.S. 123 (1968) when Defendant Gerry's admission was permitted into evidence.

Over objection, Agent Sean Hilly was permitted to testify regarding Defendant Gerry's damaging admission to Kraft that he had cashed all the Superfecta tickets and that

he gave cash to the drivers and not tickets. (1752, 1753-56) The admission in this joint trial of Gerry's incriminating statement was violative of Appellant Perry's right of confrontation under the Sixth Amendment despite the court's instruction that such statements were binding only on Gerry. (1751) Bruton v. United States, 391 U.S. 123 (1968); Slaweck v. United States, 413 F.2d 957 (8th Cir., 1969); United States v. Bujese, 405 F.2d 888 (2d Cir., 1969); United States v. Cassino, 467 F.2d 610 (2d Cir., 1972)

POINT X

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28 (i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEF FOR CO-DEFENDANT GERRY ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE REASONS SET FORTH IN POINTS I AND IV, PERRY'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; ALTERNATIVELY, IN ACCORDANCE WITH THE REMAINING POINTS, PERRY'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

RESPECTFULLY SUBMITTED,

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JULIA P. HEIT
of Counsel

A 201 Affidavit of Service by Mail G LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

USA,
Appellee,

against

PERRY AND GERRY,
Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Karen Giles, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1013 East 180th Street, Bronx, New York

That upon the 25th day of November 1974, deponent served the annexed Brief upon David A. Trager attorney(s) for in this action, at 225 Cadman Plaza, New York, Brooklyn the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 25th day of November 1974

Karen Giles

Print name beneath signature

KAREN GILES

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975